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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JONATHAN J. POLLARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

The arguments of the United States in opposition to certiorari are constructed almost entirely on fundamental mischaracterizations of the questions presented and the arguments advanced by petitioner, inaccurate interpretations of the relevant authorities, and misstatements of the facts and the decision below.

1. The government's threshold argument—that the Court should not review the important, substantial and recurring legal questions presented by this case because petitioner "has not satisfied the cause-and-prejudice standard for excusing . . . procedural default" (Opp. at 8)—should be rejected by this Court just as it was by the court below. The Court of Appeals chose to review "petitioner's claim of a plea-agreement violation on the merits," Opp. at 8, concluding that "the law is rather unclear as to what claims can be raised in a § 2255 motion that were not raised at sentencing," and that "it may well be that the government . . . waived its waiver claim . . . ." Pet. App. 10a; *see also id.* 36a (Williams, J., dissenting) ("As the government at no point below asserted the cause and prejudice standard, it has waived the defense."). Moreover, the government's belated waiver defense does not relate to the *jurisdiction* of this Court or the Court of Appeals because even if it were factually and legally supportable and timely presented, the "cause-and-prejudice" standard of *United States v. Frady*, 456 U.S. 152 (1982), establishes only a prudential rule for hearing collateral attacks under § 2255.

2. The government's contention that "there is no circuit conflict" (Opp. at 9) as to Question 1 regarding the standard of review to be applied to breach of plea agreement claims is predicated upon a substantial distortion both of the decision below and the decisions of the other circuits on *either* side of the issue. In fact, the court below explicitly recognized and commented on the conflict. Pet. App. 16a (noting that standard of review is "unsettled" and that "[s]everal circuits review district court determinations of whether or not a plea agreement has been breached *de*

novo," while "[s]everal others will set aside a district court's finding concerning breach of a plea agreement only if clearly erroneous").

Just two weeks ago, on September 1, 1992, the First Circuit expressed heightened concern over the escalating uncertainty on this issue both within and among the circuits:

> Recent precedent suggests that the question of whether a plea agreement has been breached is one of law and that our review is plenary . . . . Other cases hold that a district court's determination of breach or no breach is a factual question reviewable for clear error only.

United States v. Roberts, No. 91-1721, 1922 WL 209646, at *2 & n.5 (1st Cir. 1992) (citations omitted).

The government's denial of the conflict among the circuits relative to the standard of review is particularly perplexing since its advocacy, after the decision below, for application of a clearly erroneous standard in a breach of plea agreement case was squarely and unequivocally rejected by the First Circuit: "Contrary to the government's assertion, [the First Circuit] reviews *de novo* the question whether the government has breached a plea agreement with a defendant." *Kingsley v. United States*, 968 F.2d 109, 114 (1st Cir. 1992).

As the government well knows from its defeats in other cases, at least three other circuits have held that breach of plea agreement claims are subject to *de novo* review. Pet. at 12-19; *see, e.g., United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989) ("The government argues that the standard of review should be plain error. It is not."); *United States v. Fisch*, 863 F.2d 690 (9th Cir. 1988); *United States v. Jimenez*, 928 F.2d 356, 363 (10th Cir.), *cert. denied*, 112 S. Ct. 164 (1991). Three other circuits, like the court below, have held that the clearly erroneous standard applies. *See, e.g., United States v. Conner*, 930 F.2d 1073, 1076 (4th Cir.), *cert. denied*, 112 S. Ct. 420 (1991); *United States v. Ataya*, 864 F.2d 1324, 1337 (7th

Cir. 1988); *Raulerson v. United States*, 901 F.2d 1009, 1012 (11th Cir. 1990).

The government's attempt to reconcile these sharply and evenly divided lines of authority is either disingenuous or confused. It begins with the unremarkable proposition that "the distinction between issues of fact and issues of law for reviewability purposes is well grounded in this Court's decisions." Opp. at 9. But that postulate ignores the "vexing nature" of this distinction, *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), the intense confusion it can engender, *see Roberts*, 1992 WL 209646 at *2, and the clear disagreement among the circuits as to whether a breach of plea agreement claim raises a predominantly factual issue, subject to clearly erroneous review, or a legal issue that must be reviewed *de novo*.

The government itself has apparently been confused by the fact/law inquiry in this case. It mistakenly and repeatedly asserts that there were "disputed issues of fact" below, and that the court "applied the clearly erroneous standard only in reviewing the district court's factual assessment of the government's conduct." Opp. at 9-10. That contention is flatly and demonstrably incorrect. The historical facts here—the terms of the agreement and what the government said and did during the sentencing proceedings—are all on the record and entirely undisputed. The only question before the court below was whether the district court drew the correct legal conclusions when it measured the government's conduct against the obligations imposed by the agreement, *i.e.*, whether the government's admitted, acknowledged and undisputed conduct constituted a breach of its promises to petitioner. As the court below correctly understood, "the question is *only* whether the government's arguments transgressed the agreed norm." Pet. App. 19a (emphasis added).

Therefore, to say, as the government does, that petitioner's arguments raised issues "of fact," and that the clearly erroneous standard therefore governs, is simply wrong. The court below was deferring not to factual de-

cisions by the district judge, but to "his assessment of whether the government's conduct" violated the plea agreement's terms. Pet. App. 17a. And as the government is forced to concede, a number of courts have squarely held that the "ultimate question whether the plea agreement was violated *is subject to plenary review*" because it is a question of law. Opp. at 9 (emphasis added). Those courts have done so under circumstances almost identical to those presented in this case.

For example, in *United States v. Moscahlaidis*, 868 F.2d at 1360, the government, as in this case, promised to limit its sentencing allocution to the " 'nature and extent of [the defendant's] activities with respect to the case.' " *Id.* at 1362. The government breached that promise when the prosecutor made statements concerning the defendant's " 'greed and moral bankruptcy' " and " 'utter contempt' " for society, expressing his "opinion of [the defendant's] character." *Id.* In a decision diametrically opposed to the Court of Appeals in this case, the Third Circuit concluded that "[w]hether the government's conduct violates the terms of the plea agreement is a *question of law and our review is plenary.*" *Id.* at 1360 (emphasis added).

United States v. Canada, 960 F.2d 263 (1st Cir. 1992), involved an issue similar to the contention here that the government breached the plea bargain by failing to inform the sentencing court of the "considerable value" of petitioner's cooperation[1] and by "calling for a life sentence

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[1] The government has persistently mischaracterized the plea agreement in this case by stating that it had promised only to "advise the court of the petitioner's cooperation," Opp. at 5, or "describe" his cooperation, *id.* at 7, or "explain the extent and value of his cooperation." *Id.* at 12-13. In fact, it agreed in writing to go much further and affirmatively to "represent" that his cooperation had been "of considerable value to the Government's . . . enforcement of the espionage laws." Pet. App. 77a. The government's allocution instead denigrated the value of petitioner's cooperation, breaching its promise *as a matter of law*. The district court plainly misinterpreted the agreement as permitting the government to "explain the positive value of the cooperation in one sense (damage assessment)" while at the same time "noting that

in all but name." Pet. App. 44a (Williams, J., dissenting); *see* Pet. at 4-7. In *Canada*, the defendant claimed that the government's "overall conduct," and its "grudging and apologetic" performance, 960 F.2d at 269, amounted to "an implied repudiation" (*id.* at 271) of its promises to recommend a particular sentence and to advise the Court of *"the full nature and extent of* [*the defendant's*] *cooperation." Id.* at 268 (emphasis in original). The First Circuit, like the Third Circuit in *Moscahlaidis*, held that the defendant's breach of plea agreement claims presented legal questions subject to *de novo* scrutiny. *Id.* at 269.

The Ninth and Tenth Circuits have also implemented the *de novo* review standard in cases involving virtually identical circumstances. *See United States v. Fisch*, 863 F.2d at 690 (where the court "review[ed] *de novo* [defendant's] claim" that the government breached its agreement concerning defendant's cooperation); *United States v. Jimenez*, 928 F.2d at 363 (whether the government's statements during sentencing breached its promise raised "a question of law subject to *de novo* review").

Several other circuits have taken the opposite view: that the "ultimate question" (Opp. at 9) whether government actions violate a plea bargain raises an issue of fact, even where, as here, the terms of the plea agreement and the underlying facts surrounding its performance are not in dispute.

The government's efforts to explain away this clear and irreconcilable circuit conflict do not even come close. For example, while the government asserts that *Raulerson v. United States*, 901 F.2d at 1012, involved "disputed issues of fact," that case involved no dispute whatsoever as to *either* the express, unambiguous provisions of the plea agreement, *id.*, *or* the various actions of the government that formed the predicate of the defendant's breach claim.

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defendant had frustrated the Government's efforts in another sense (law enforcement)." Pet. App. 63a-64a. But this construction, which the Court of Appeals accepted, *id.* 23a n.8, was directly contrary to the explicit written promise.

See id. at 1012-13. Nonetheless, the Eleventh Circuit held that the "district court's findings on the scope of the agreement and whether the government breached its promise will only be set aside if they are clearly erroneous." *Id.* at 1012.

Nor were there any contested facts in *United States v. Ataya*, 864 F.2d at 1324. The government claimed that the defendant breached a plea bargain and the Seventh Circuit invoked the clearly erroneous standard even though the "plea agreement unambiguously set forth the defendant's obligations" to cooperate with the government and the defendant indisputably "refus[ed] to cooperate with the government." *Id.* at 1335, 1337. And the Fourth Circuit's decision in *Conner* is confusing at best because the court there applied the clearly erroneous standard both to the district court's factual findings concerning the conduct of the parties *and* to the district court's conclusions regarding whether that conduct constituted a breach of the plea agreement. 930 F.2d at 1076-77.

3. Despite this intolerable conflict among the circuits on an important and constantly recurring[2] subject, the government opposes review by this Court and offers the unsupportable justification that the Court of Appeals would have reached the same result in this case even if it had reviewed the district court's decision *de novo*. Opp. at 11. Not only is there no affirmative basis for this bold hypothesis, the decision below directly contradicts it. The Court of Appeals obviously perceived that its selection of the clearly erroneous standard had a material, likely determinative, impact on the outcome of this case. It acknowledged the standard-of-review conflict among its sister circuits and devoted a substantial portion of its opinion to

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[2] Although the courts of appeals in " 'recent years [have] been repeatedly confronted with difficult questions concerning the interpretation and enforcement of plea bargains'," *Ataya*, 864 F.2d at 1329 (citation omitted); *see* Pet. at 19, "[t]his Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements." *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J., dissenting).

explaining its choice among the opposing alternatives. Pet. App. 16a-19a. Having chosen the clearly erroneous standard, it repeatedly emphasized the significance of that choice to its decision. *See, e.g.*, Pet. App. 20a ("certainly we find no clear error"); *id.* 25a ("we do not believe that the district court's ruling on this point can reasonably be thought clearly erroneous"); *see also id.* 25a (pointedly criticizing the dissent for being insufficiently deferential to the district court).

4. The government also grossly mischaracterizes the issue presented by petitioner in Question 2 regarding the standard for collateral relief under 28 U.S.C. § 2255. Opp. at 12. Petitioner does *not* contend that the miscarriage-of-justice standard is inapplicable in § 2255 cases involving plea agreement breaches. Petitioner argues instead that that standard was rendered unattainable by the holding below that even if the government had breached a material inducement in the plea agreement, that conduct alone would not constitute a "fundamental defect" or miscarriage of justice. The court below rewrote the miscarriage-of-justice standard by erecting three additional barriers to relief in cases like this one, requiring proof not only that the government committed a "breach of a promise that induced the guilty plea," Pet. App. 28a, as required by *Santobello v. New York*, 404 U.S. 257, 262-63 (1971), but that the defendant establish also (a) that the inducement was "significant," (b) that the promise was "definite," and (c) that the violation was "clear." Pet. App. 28a (emphasis added). This new formidable standard placed the court below in conflict with other circuits that have followed *Santobello* and have held that "[t]he government may not breach any term of a plea agreement which induced the defendant to plead guilty," *Panzardi-Alvarez v. United States*, 879 F.2d 975, 986 (1st Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990), even in collateral relief cases. *See also* Pet. at 19-26.

The government dismisses the many decisions at odds with the court below by asserting that "[i]t does not appear in those cases that the government made a distinct argument concerning the heightened standard for relief under

[§] 2255." Opp. at 14 n.3. If nothing else, this statement reveals that the government has apparently not heretofore found it necessary to seek a collateral review standard comparable to that created by the court below, and that, until the decision below, no such separate standard existed. Indeed, the government did not even argue in this case for the formulation of the § 2255 standard applied to petitioner's claims: the court below *sua sponte* devised its three-level obstacle to relief. The dual standard that has been created by the decision below, and the confusion that it will inevitably cause, underscores the need for this Court to grant the writ to clarify the correct standard for collateral review of plea agreement violations.

The government cannot deny that the new § 2255 standard adopted by the court below for this case was the "decisive barrier" (Pet. App. 27a) to petitioner's claim that the government's bitter exegesis on petitioner's personal characteristics and beliefs violated its promise to limit its allocution to the "facts and circumstances" of his offense. Opp. at 13.[3] The government contends, however, that the § 2255 standard did not affect the other two claims because the court "rejected" on the merits petitioner's claims that the government breached the plea agreement by arguing for a life sentence and by failing to represent to the sentencing judge that petitioner's cooperation had been valuable to the government's enforcement of the espionage laws. But the government fails to recognize that, if this Court were to hold that a *de novo* standard of review applies rather than the clearly erroneous standard, there is a strong possibility that the court below would find that the government committed all three of the plea agreement vio-

[3] The government's highly inappropriate assertion that petitioner himself "violated the terms of the plea agreement," Opp. at 4, not only is completely irrelevant but flatly incorrect. The government at *no* time sought or obtained an adjudication of this question. Indeed, the government's remedy if petitioner did breach the plea agreement is rescission of the agreement—the remedy being sought by petitioner. It is not a license for the government unilaterally to repudiate and breach the promises it made to petitioner. *See, e.g., United States v. Simmons*, 537 F.2d 1260, 1261-62 (4th Cir. 1976).

lations alleged by petitioner. The collateral relief standard would then have a direct and unavoidable impact on Mr. Pollard's ability to obtain § 2255 relief predicated upon all three of the government's plea agreement violations.[4]

Finally, the government minimizes the impact of the special § 2255 standard adopted by the court below by recasting petitioner's contention in this case as a claim of "an *implicit* breach of the plea agreement resulting from the *tone* of the government's allocution." Opp. at 14 (emphasis added). The government is thus able to dismiss this case as simply a replay of *United States v. Benchimol*, 471 U.S. 453 (1985). There, the Court rejected the claim that the government breached a plea agreement for failure "enthusiastically" to make certain recommendations to the sentencing judge.

But this case does not involve "implicit" promises, the "tone" of the government's allocution, or the level of the government's enthusiasm. All three promises were explicit; all three were directly breached.[5] The government's be-

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[4] For example, under its heightened § 2255 standard, the court below declined to construe ambiguous provisions against the government and in favor of Mr. Pollard. *See* Pet. App. 25a-27a. This approach to plea agreement interpretation favors the government's position much more than that followed by other circuits in § 2255 cases. *See, e.g., Kingsley v. United States*, 968 F.2d at 114 (granting § 2255 relief for government's breach of ambiguous plea agreement while noting that "in determining the government's obligations under a plea agreement, we must hold the government to 'the most meticulous standards of both promise and performance' "); *United States v. Garcia*, 956 F.2d 41, 44 (4th Cir. 1992) (granting § 2255 relief for government's breach of ambiguous plea agreement while noting that "both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements").

[5] The government's brief inexplicably—and inexcusably—attempts to leave the impression that there may have been some dispute as to whether it promised to refrain from recommending a life sentence, Opp. at 11 n.2, despite the fact that the government has *never* contested that promise, the court below expressly found that it was "not in dispute,"

trayal of the three promises to petitioner that indisputably were material inducements to his plea of guilty had not a thing to do with the "tone" of the government's allocution. Its broken promises went to the very essence of petitioner's bargain—namely, whether the government would refrain from recommending that petitioner receive a life sentence, whether the sentencing judge would be told that petitioner's cooperation had been of "considerable value" to the government's enforcement of the espionage laws, and whether the government would limit its allocution to "facts and circumstances," rather than opinion, hyperbole, rhetoric and character assassination.

5. The government contends that the decision below that the "wiring" of petitioner's guilty plea to that of his seriously ill wife did not violate the Constitution is "[c]onsistent with the views of other courts of appeals." Opp. at 18. It is not. As petitioner has demonstrated, Pet. at 26-28, the courts of appeals have articulated widely varying interpretations of *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978), in which the Court suggested that wired pleas might raise special procedural and substantive issues relating to voluntariness. The court below here gave the prosecutor the broadest latitude imaginable. *See, e.g.*, Pet. App. 14a ("Almost anything lawfully within the power of a prosecutor acting in good faith may be offered in exchange for a guilty plea."). But other courts have held that plea wiring imposes a heightened standard of good faith on the prosecutor, and that such a procedure may violate the Constitution even if the prosecutor was acting in good faith, thus requiring additional procedural protections to ensure the plea was voluntary. *See* Pet. at 28. This Court should grant the petition and resolve the issue to bring certainty to this difficult, important and rapidly expanding area of the law.

Pet. App. 19a, and the government expressly conceded at oral agrument in the court below that, "[*w*]*e agreed not to ask for life.*" Tr. of Oral Argument at 51 (Sept. 10, 1991) (emphasis added).

September 15, 1992

Respectfully submitted,

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